BCM Development Sdn Bhd v The Titular Roman Catholic Bishop of Malacca Johor

HIGH COURT (JOHOR BAHRU) — CIVIL SUIT NO MT4–22–100 OF 2002
AZAHAR MOHAMED J
24 AUGUST 2009

Contract — Breach — Termination — Breach of development right agreement ('DRA') — Termination of DRA by defendant — Termination due to breach of term of contract by plaintiff — Whether termination was wrongful — Whether obligations of parties under DRA suspended pending removal of squatters — Whether plaintiff breached DRA

The defendant, a non-profitable religious body was the registered and beneficial owner of 241,249 acres of land situated in Johor Bahru ('the land'). The plaintiff and defendant landowner entered into a development right agreement ('DRA') by which the defendant allowed the plaintiff to develop the land into a residential, commercial and industrial estate ('the project'). In consideration for being granted the exclusive right to undertake to develop the land the plaintiff agreed to pay the defendant a sum of RM24m on the dates and times as stipulated in the DRA. Subsequently the plaintiff and the defendant entered into a supplemental agreement to vary the terms of the DRA including, inter alia, the schedule for payment of the cash consideration, and then into a second supplemental agreement to further vary the terms of the DRA regarding the payment schedule. Thereafter the plaintiff again requested for a variation of the terms of the DRA, inter alia, to defer payment of the cash consideration to the defendant. At the same time the plaintiff had written to the local authority for approval of its building plans on the land but the local authority had only approved the plans in respect of a part of the project. In the plaintiff's building plans one means of access to the project site was along a reserve road ('the reserve road'), which was allegedly occupied by squatters. According to the plaintiff, the application for approval was held in abeyance until the issue of the squatters was resolved. In the meantime the defendant issued a notice of default to the plaintiff regarding the plaintiff's failure to pay the balance of the cash consideration as agreed and interest charges ('the default'). In that notice the defendant had clearly informed the plaintiff that the DRA would be deemed to be terminated if the plaintiff failed to remedy the default within 30 days of receipt of the notice. In response the plaintiff replied that the various obligations of the parties under the DRA were suspended pending removal of

the squatters. The defendant then terminated the DRA and requested for a return of possession of the land. The plaintiff therefore instituted the present action against the defendant for damages for the wrongful termination of the DRA. The defendant in turn counterclaimed against the plaintiff for being in breach of the DRA. The plaintiff submitted that there was a legal as well as equitable suspension of the terms of the DRA by reason of the intervening events which were beyond the control of the parties, namely, the suspension of the required building plans by reason of the squatters occupying the reserve road. Based on this the plaintiff contended that it was implied in the terms of the DRA that the defendant would be responsible for removing the squatters occupying the reserve road. The plaintiff also took the position that it was not in breach of the DRA for the reason that the DRA had already been suspended. The two issues for determination in this case were whether the plaintiff had rightfully and validly suspended the DRA and whether the plaintiff had breached the DRA.

Held, dismissing the plaintiff's claim with costs and allowing the defendant's counterclaim with costs:

(1) The plaintiff's role under the DRA was that of a developer and even though the plaintiff knew that there were squatters on the road reserve it had agreed to undertake to develop the defendant's land at its own costs and according to the building plans and to comply in all respects with the conditions imposed on the approval granted in respect of the project. In the circumstances, the requirement by the local authority that the squatters had to be removed from the reserve road before approval could be granted for the plaintiff's building plans had not created a new set of facts. The squatter issue had existed prior to the execution of the DRA and was not an intervening event and thus there was no need to imply into the DRA that the defendant was to be responsible for removing the squatters occupying the reserve road. As such, based on the evidence as a whole the plaintiff was not entitled to suspend the DRA and the plaintiff's suspension of the DRA was unlawful (see paras 29–32).

(2) In the present case, the time of the essence stipulation was to apply to the payment of the balance of the cash consideration and of the interest charges on the dates specified in the DRA and the supplemental agreements thereto. As a result, the plaintiff's failure to pay the amounts outstanding on the dates they became due constituted breaches of a fundamental term going to the root of the contract, which entitled the defendant to terminate the DRA (see paras 41–42).

[Bahasa Malaysia summary

Defendan, yang merupakan sebuah pertubuhan keagamaan yang bukan berasaskan keuntungan adalah pemilik berdaftar dan benefisial 241,249 ekar tanah yang terletak di Johor Bahru ('tanah tersebut'). Plaintif dan pemilik tanah defendan menandatangani suatu perjanjian hak pembangunan ('PHP') di mana defendan membenarkan plaintif membangunkan tanah tersebut kepada estet kediaman, komersial dan perindustrian ('projek tersebut'). Sebagai balasan kerana diberikan hak eksklusif untuk mengakujanji bagi membangunkan tanah tersebut plaintif bersetuju untuk membayar defendan sebanyak RM24 juta pada tarikh dan masa seperti yang ditetapkan dalam PHP. Kemudiannya plaintif dan defendan menandatangani satu perjanjian tambahan untuk mengubah syarat-syarat PHP, termasuk, antara lain, jadual untuk pembayaran balasan secara tunai, dan kemudian menandatangani satu perjanjian tambahan kedua untuk selanjutnya mengubah syarat-syarat PHP mengenai jadual pembayaran. Selepas itu plaintif sekali lagi memohon untuk satu variasi ke atas syarat-syarat PHP, antara lain, untuk menangguhkan pembayaran balasan secara tunai kepada defendan. Pada masa yang sama plaintif telah menulis kepada pihak berkuasa tempatan untuk kelulusan pelan-pelan pembangunannya di atas tanah tersebut tetapi pihak berkuasa tempatan hanya meluluskan pelan-pelan untuk sebahagian projek tersebut. Dalam pelan-pelan pembangunan plaintif salah satu akses untuk ke tapak projek tersebut adalah sepanjang suatu jalan rizab ('jalan rizab tersebut'), yang dikatakan dididuki oleh penduduk setinggan. Menurut plaintif, permohonan untuk kelulusan telah ditunda sehingga isu penduduk setinggan itu diselesaikan. Sementara itu, defendan mengeluarkan suatu notis keingkaran kepada plaintif mengenai kegagalan plaintif untuk membayar baki balasan secara tunai seperti yang dipersetujui dan caj faedah ('keingkaran tersebut'). Dalam notis tersebut defendan dengan jelas memaklumkan kepada plaintif bahawa PHP akan dianggap terbatal jika plaintif gagal meremedikan keingkaran tersebut dalam tempoh masa 30 hari dari tarikh penerimaan notis tersebut. Sebagai balasan plaintif menjawab bahawa pelbagai kewajipan pihak-pihak di bawah PHP telah digantung sementara menunggu penyingkiran penduduk setinggan tersebut. Defendan kemudiannya membatalkan PHP tersebut dan meminta untuk pemulangan milikan tanah tersebut. Maka, plaintif memulakan tindakan ini terhadap defendan untuk ganti rugi bagi pembatalan secara salah PHP tersebut. Defendan sebaliknya membuat tuntutan balas terhadap plaintif kerana keingkaran pada PHP. Plaintif menghujahkan bahawa terdapat suatu penangguhan yang sah serta ekuiti daripada syarat-syarat PHP oleh sebab kejadian-kejadian yang menghalang bukan dalam kawalan pihak-pihak, iaitu, penggantungan pelan-pelan bangunan yang dikehendaki adalah disebabkan oleh penduduk setinggan yang menduduki jalan rizab tersebut. Berdasarkan alasan-alasan ini plaintif menyatakan bahawa telah dibayangkan dalam syarat-syarat PHP

bahawa defendan akan bertanggungjawab untuk menyingkirkan penduduk setinggan yang menduduki jalan rizab tersebut. Plaintif juga mengambil pendirian bahawa ia tidak mengingkari PHP tersebut atas alasan bahawa PHP telah digantung. Dua isu untuk ditentukan dalam kes ini adalah sama ada plaintif telah dengan betul dan sah menggantung PHP dan sama ada plaintif telah mengingkari PHP tersebut.

Diputuskan, menolak tuntutan plaintif dengan kos dan membenarkan tuntutan balas defendan dengan kos:

(1) Peranan plaintif di bawah PHP adalah sebagai seorang pemaju dan walaupun plaintif tahu bahawa terdapat penduduk setinggan di jalan rizab tersebut ia telah bersetuju untuk mengakujanji bagi membangunkan tanah defendan dengan perbelanjaannya sendiri dan menurut pelan-pelan pembangunan dan mematuhi semua syarat yang dikenakan ke atas kelulusan yang diberikan berkenaan dengan projek tersebut. Dalam keadaan-keadaan sebegitu, keperluan oleh pihak berkuasa tempatan bahawa penduduk setinggan perlu disingkirkan dari jalan rizab tersebut sebelum kelulusan boleh diberikan untuk pelan-pelan pembangunan plaintif tidak mewujudkan suatu set fakta yang baru. Isu penduduk setinggan telah wujud sebelum pelaksanaan PHP dan bukanlah kejadian yang menghalang dan oleh itu tidak perlu untuk dibayangkan ke dalam PHP bahawa defendan bertanggungjawab untuk menyingkirkan penduduk setinggan yang menduduki jalan rizab. Oleh itu, berdasarkan bukti-bukti secara keseluruhannya plaintif tidak berhak untuk menggantung PHP dan penggantungan PHP oleh plaintif adalah menyalahi undang-undang (lihat perenggan 29–32).

(2) Dalam kes ini, stipulasi masa adalah intipati yang digunapakai terhadap pembayaran baki balasan secara tunai dan caj faedah pada tarikh yang dinyatakan dalam PHP dan pada perjanjian-perjanjian tambahan. Hasilnya, kegagalan plaintif untuk membayar amaun-amaun yang tertunggak pada tarikh ianya harus dibayar menjadikan kemungkiran terma asas yang menjadi tunjang kontrak tersebut, yang memberikan hak kepada defendan untuk membatalkan PHP tersebut (lihat perenggan 41–42).]

Notes

For a case on termination of contract, see 3(1) *Mallal's Digest* (4th Ed, 2006 Reissue) para 2713.

Cases referred to

Bell & Anor v Lever Bros Ltd [1932] AC 161, HL (refd)

Lombard North Central Plc v Butterworth [1987] 1 QB 527, CA (refd)

R v Paddington and St Marylebone Rent Tribunal, ex parte Bedrock Investments Ltd [1947] KB 984 (refd)
Tai Hing Cotton Mill Ltd v Liu Chong Hill Bank Ltd & Ors [1985] 2 All ER 947, PC (refd)

Legislation referred to
Contracts Act 1950 s 56
Roman Catholic Bishops (Incorporation) Act 1957

WJ Chen (WJ Chen & Co) for the plaintiff.
Raja Aziz (Nicole Wee & LS Koong with him) (Chooi & Co) for the defendant.

Azahar Mohamed J:

[1] This is an action by the plaintiff for damages based on a wrongful termination of an agreement. The defendant has a counterclaim against the plaintiff arising from the same agreement.

BACKGROUND FACTS

[2] The undisputed facts relating to this action are as follows. The plaintiff was at all material times, carrying on its business as a licensed property developer. The defendant is a body incorporated under the Roman Catholic Bishops (Incorporation) Act 1957 as a non-profitable religious body. The defendant is the registered and beneficial owner of all that pieces of land held under Grant 1968 Lot 287, Grant 1969 Lot 288, Grant 517 Lot 755, Grant 565 Lot 806, CT 14835 Lot 2560, CT 14836 Lot 2561 and CT 14537 Lot 2562, all situated in the Mukim of Plentong, in the district of Johor Bahru, Johor, measuring an area approximately 241.249 acres (collectively called 'the land'). Part of CT 14835 Lot 2560 was acquired by the government by way of compulsory acquisition such that the total area of the land after the said compulsory acquisition measured approximately 231.4244 acres.

[3] By a development right agreement dated 16 March 1997 ('the DRA') entered into between the plaintiff and the defendant, the defendant agreed, inter alia, to allow the plaintiff to develop the said land into a residential, commercial and industrial estate ('the project') on the terms and conditions contained in the DRA. In essence, the DRA provided that the consideration to the defendant for granting the plaintiff the exclusive right and authority to undertake to develop the said land were:

(a) the payment by the plaintiff to the defendant of a total sum of RM24m ('the cash consideration') to be made in the following manner:

    (i) as to RM4m, on the execution of the DRA; and

(ii) as to the balance of RM20m, on the following dates:

(a) RM3m on 31 December 1998;

(b) RM5m on 31 December 1999;

(c) RM6m on 31 December 2000; and

(d) RM6m on 31 December 2001, and

(b) the provision by the plaintiff to the defendant of an agreed number of units of each of the different categories of the premises to be designed, constructed and completed by the plaintiff pursuant to the DRA, as listed in Appendix C to the DRA.

[4] The plaintiff's obligations, as expressed in the DRA, were, among others:

(a) to submit and obtain from the appropriate authorities, at its own expense, such plans as were necessary for the development of the said land by phases and for subdivision;

(b) to comply in all respects with all relevant statutory instruments, rules, etc and, in particular, with the conditions imposed in the approvals granted in relation to the development of such phases of the said project and shall do all such development works and things as shall be lawfully thereby and pay and (without prejudice to any statutory indemnity) indemnify the owner against all fees, etc and expenses to be made or incurred thereunder;

(c) at its own cost and expense to construct in accordance with the standard requirements of the appropriate or other public authorities all roads, etc to and within the said land and on the completion thereof to do all acts within its power to have the same taken over and maintained by the appropriate public authorities; and

(d) to bear all costs of the development of the said project.

[5] By a letter dated 15 May 1999, the Pentadbir Tanah Johor Bahru informed the plaintiff that the total land premium required for the conversion and subdivision of the land is in the sum of RM1,735,434. After that, by a letter dated 10 June 1999 from the Pejabat Pengarah Tanah dan Galian to the Pentadbir Tanah Johor Bahru, the plaintiff's request for payment for the approval of surrender and realienation of the said land by way of instalment was approved with the first instalment of 30% being RM520,630.20. The said first instalment amounting to RM520,630.20 was paid by the plaintiff on 6 July 1999.

[6] Not long after that, the plaintiff and the defendant entered into a supplemental agreement dated 30 August 1999 to vary the terms and conditions of the DRA including, inter alia, the schedule for payment of the cash consideration. Subsequently, both the parties entered into a second supplemental agreement dated 29 March 2000 to vary the terms and conditions of the DRA, inter alia, to:

(a) allow the plaintiff the use of a road situated on Lot 286, Mukim of Plentong ('Lot 286') as access ('access') to the site of the first phase of the project; and

(b) further, vary the schedule for payment of the cash consideration by the plaintiff to the defendant.

[7] By a letter dated 21 April 2000, the Majlis Daerah Johor Bahru Tengah confirmed its decision in approving the building plans in respect of 199 units of double storey terrace houses but held in abeyance the approval in respect of the proposed 210 units of low medium costs apartments, both identified as, and forming part of phase 1 of the project.

[8] Next, by a letter dated 18 July 2000, the plaintiff again requested for a variation of the terms of the DRA, inter alia, to defer payment of the cash consideration to the defendant.

[9] What follows thereafter, by letters dated 31 July 2000 and 11 October 2000, the defendant agreed to the plaintiff's request to vary the terms and conditions of the DRA, inter alia, to accept a transfer by assignment of condominium units in Mewah View Luxurious Apartments in lieu of the bank guarantee.

[10] Then, by a letter dated 30 April 2001, the plaintiff informed the defendant that their respective obligations under the DRA should be suspended. The plaintiff informed the defendant that due to the issue of the squatters, the local authority had decided not to approve further plans, including those for phase 2 of the project, and suggested that as the said decision was due to circumstances beyond the plaintiff's and the defendant's control, it would be fair and equitable to suspend the party's obligations under the DRA until such time as the squatter issues were resolved and the local authority approved the plans. The defendant did not agree to suspend the DRA.

[11] Now, one means of access to the project site as set out in the approved layout plans was along a reserve road ('the road reserve'). The road reserve was

allegedly occupied by squatters. The defendant is not, and was not at all material times the registered proprietor of the land on which the road reserve was situated.

[12] By a letter dated 2 May 2001 from the plaintiff to the Jurutera Daerah, JKR (Daerah) Johor Bahru, the plaintiff sought the consent of the JKR to build an alternative access road ('the alternate access') to the project on Lot 1781 in front of Giant. In it, the plaintiff also agreed to bear all costs in respect of the construction of the said alternate access as well as all costs of any land acquisition in respect thereof and all costs in respect of any and all squatter houses that may be involved in the construction of the said alternate access. It is to be noted that neither the plaintiff nor the defendant was the registered proprietor of Lot 1781.

[13] After that, pursuant to a letter dated 16 May 2001 from the Pejabat Jurutera Daerah, JKR (Daerah) Johor Bahru to the Pentadbir Tanah Johor Bahru and copied to the plaintiff, the plaintiff was made aware that the JKR had no objections to the proposal of the alternate access.

[14] Subsequently, by a letter dated 30 May 2001 from the defendant to the plaintiff, and further to the second supplemental agreement, the defendant agreed to grant the plaintiff a permanent right of way for construction of the alternate access across Lot 286 subject to compensation payment by the plaintiff to be computed at the rate of RM9.46 per sq ft, which was the same rate agreed upon in cl 2.1.3(a)(ii) of the supplemental agreement. The plaintiff did not construct the said alternate access.

[15] By a letter dated 24 June 2001 from United Design Architects Sdn Bhd ('UDA'), UDA confirmed, inter alia, that the building plan for phase 1 of the project had been approved and obtained on 30 May 1998, and that the earthwork plan had also been approved. The plaintiff had therefore commenced development of the said phase 1 and as at 21 June 2001, the building work for phase 1 was 30.93% completed.

[16] Then thereafter, by a letter dated 17 July 2001, the Majlis Perbandaran Johor Bahru Tengah informed the plaintiff that the application for approval of the building plans for phases 2A and 2B of the project would be held in abeyance until the developer resolved the issue of the squatters.

[17] Then an important thing happened. By a notice dated 12 December 2001, the defendant required the plaintiff to remedy alleged defaults of the DRA as set out in the said notice, about which more will be said further on at a later stage.

[18] A little while later, by a letter dated 13 December 2001, the plaintiff reiterated that the DRA had been suspended. Before long, the defendant had by its letter dated 16 January 2002 terminated the DRA, and at once, by its letter dated 17 January 2002 requested for the return of possession of the said land. In this regard, the defendant had, under cover of a letter dated 14 December 1999, forwarded to the plaintiff the original master titles for the land to the plaintiff pursuant to cl 5.1.2 of the DRA, to enable the plaintiff to submit the same to the relevant authorities for subdivision and issuance of the subdivided titles.

[19] Thereafter, the plaintiff had forwarded the original master titles for the land to the relevant authorities for subdivision and issuance of the subdivided titles. On or before 19 November 2001, the subdivided titles in respect of the said lands were forwarded by the relevant authorities to the plaintiff. By a letter dated 19 November 2001 to the plaintiff, the defendant requested that the subdivided titles in respect of the said lands be returned by the plaintiff to the defendant in accordance with the DRA. To date, some of the said subdivided titles and remaining master titles have not been returned by the plaintiff to the defendant.

[20] It was agreed by consent by the plaintiff and the defendant that the issue of liability should be dealt with first by this court, with the issue of damages to be gone into subsequently.

FINDINGS OF THE COURT ON THE ISSUE OF SUSPENSION OF THE DRA

[21] In my view the core question to be decided in this action is whether the plaintiff had rightfully and validly suspended the DRA on 3 April 2001.

[22] It is the plaintiff's case that it was the duty of the defendant, as the landowner, to provide access to and from the project. By the approved layout plan of the project, it was stipulated that the main access leading to and from the project be constructed along a specific road reserve. This road reserve was occupied by some squatters. The contention of the plaintiff is that part of the buildings plans for phase 1 of the project consisting of 199 units of double storey terrace houses approved by the authority on 30 May 1998 but approval in respect of the balance of 210 units of low-medium costs apartments in the same phase 1 was held in abeyance pending removal of the squatters which decision to hold in abeyance was confirmed subsequently by the relevant authority in writing as can be seen in the letter dated 21 April 2000 and the letter dated 17 July 2000. Thus, according to the plaintiff, the parties various obligations under the DRA was suspended pending removal of the squatters.

[23] On the basis of these facts, learned counsel for the plaintiff argued that there was legal as well as equitable suspension of the terms of the DRA by reason of intervening events beyond the control of the parties, namely, suspension of the required building plans by the authority by reason of the squatters occupying the road reserve earmarked as the main access to the project.

[24] Therefore, the premise of the contention of the plaintiff is this: there must certainly be implied into the DRA a term not only for the provision of access by the defendant as the owner of the land but the access to be provided must be free from obstructions, including squatters. In other words, there was implied in the terms of the DRA that the defendant was to be responsible for removing the squatters occupying the land reserve approved by the authority for the construction of the permanent access road to the project.

[25] Regarding the principle of law applicable to implying terms in a contract, I am guided by the following passage in the judgment of Lord Goddard CJ in *R v Paddington and St Marylebone Rent Tribunal, ex parte Bedrock Investments Ltd* [1977] AC 239 at p 990:

> No covenant ought ever to be implied unless there is such a necessary implication that the court can have no doubt what covenant or undertaking they ought to have written into the agreement.

[26] The principle laid down by Lord Goddard CJ was shown in a number of cases. First, in *Tai Hing Cotton Mill Ltd v Liu Chong Hill Bank Ltd & Ors* [1985] 2 All ER 947, Lord Scarman said at p 955:

> Their Lordships agree with Cons J that the test of implication is necessity. As Lord Wilberforce put it in *Liverpool City Council v Irwin & Anor* [1976] 2 All ER 39 at p 44, [1977] AC 239 at p 254: ' … such obligation should be read into the contract as the nature of the contract implicitly requires, no more, no less; a test in other words of necessity. Cons JA went on to quote an observation by Lord Salmon in the *Liverpool* case [1976] 2 All ER 39 at p 51; [1977] AC 239 at p 263 to the effect that the term sought to be implied must be one without which the whole transaction would become 'futile, inefficacious and absurd' (see [1984] 1 Lloyd's Rep 555 at p 558).

[27] Secondly, Lord Atkin in *Bell & Anor v Lever Bros Ltd* [1932] AC 161 said at p 226:

> Nothing is more dangerous than to allow oneself liberty to construct for the parties contracts which they have not in terms made by importing implications which would appear to make the contract more businesslike or more just. The implications to be made are to be no more than are 'necessary' for giving business

efficacy to the transaction, and it appears to me that, both as to existing facts and future facts, a condition would not be implied unless the new state of facts makes the contract something different in kind from the contract in the original state of facts.

[28] Returning to the present case and going by this principle, the question that arises is, therefore, whether the requirement by the local authority, as a condition of its approving the layout plan to the project, that the squatters be removed from the land reserve, had created a new state of facts which made the DRA something different in kind from the contract in the original state of facts.

[29] Now, some important facts that cannot be overlooked in considering this question are as follows. In the first instance, the DRA does not have any provisions to allow any parties to suspend it or the terms of any of its operations. It is to be noted that the preparation and the submission of the layout plan for the project was done by the plaintiff. The layout plan submitted by the plaintiff had earmarked the land reserve as the permanent access to the project. It is equally important to stress that according to PW1, the plaintiff knew that there were squatters on the land reserve. And yet, the plaintiff had decided that the joint venture with the defendant was feasible and profitable and subsequently entered into the DRA on the agreed terms. The plaintiff's role under the DRA was that of a developer. It is also important to emphasis that even though the plaintiff knew that there were squatters on the road reserve, the plaintiff agreed to undertake to develop the defendant's land at the plaintiff's own costs and according to the layout plans and to comply in all respects with the conditions imposed in the approval granted in respect of the project. I do not think the requirement by the local authority, as a condition of its approving the layout plan to the project, that the squatters be removed from the land reserve, had created a new state of facts. Indeed, the squatter issue had existed even prior to the execution of the DRA. It was not an intervening event as argued by learned counsel for the plaintiff.

[30] Therefore, based on the evidence presented before me and taken them as a whole then, I am unable to accept that it is necessary, in the circumstances of the present case, to imply into the DRA that the defendant was to be responsible for removing the squatters occupying the land reserve approved by the authority for the construction of the permanent access road to the project.

[31] Therefore, for all these reasons I'm unable to agree with the submission of learned counsel for the plaintiff that the plaintiff was entitled to suspend the DRA by reason of the authority's suspension of approval of the

building plan pending the removal of the squatters. I am unable to accept the argument that the authority's suspension was caused by the defendant's failure to carry out its implied obligation to clear and remove the squatters.

[32] On the other hand, I agree with the submission of learned counsel for the defendant that the plaintiff's suspension of the DRA was unlawful.

FINDINGS OF THE COURT ON THE ISSUE OF WHETHER THE PLAINTIFF HAD BREACHED THE DRA

[33] Thus brings me to the next matter for consideration: whether the plaintiff had breached the DRA as set out in the notice dated 12 December 2001; and whether the DRA had been plaintiff rightfully and validly terminated by the defendant.

[34] Now, by letter dated 12 December 2001, the defendant through its solicitors sent a notice of default regarding the plaintiff's failure to pay the third tranch and interest charges. In the letter it was stated the DRA would be deemed to have been terminated if the plaintiff failed to remedy the aforesaid default within thirty days. For easy reference, the letter is reproduced as follows:

M/s W J Chen & Company

Advocates & Solicitors

Suite 6.2, Level 6

Menara Pelangi

Jalan Kuning

80400 Johor Bahru.

Dear Sirs

Re: Development Right Agreement dated 16th March, 1997 ('DRA'), First Settlement Agreement dated 30th August, 1999 and Second Settlement Agreement dated 29th March 2000 ('collectively the Said Agreement')

1. We have been instructed by our client, The Titular Roman Catholic Bishop of Malacca Johore, the landowner of the properties as defined under the said Agreements to hereby give your client, BCM Development Sdn Bhd, notice under Clause 16.1 of the DRA, which requires your client as the Developer to remedy within 30 days the following defaults, namely your client has failed to:-

1.1 settle the Milestone Payment of Ringgit Malaysia Six Million (RM6,000,000.00) due on the 30th June, 2001 to our client;

1.2 settle the interest due on the 31st May, 2001 amounting to

RM62,500.00 with penalty interest accruing thereon to our client and our client's legal cost in securing legal advice; and

1.3 give effect and complete the assignment of the Mewah View Luxurious Apartments to the value of RM10,444.00 in lieu of the Bank Guarantee which should have been furnished by your client to our client under the said Agreements as security for the granting of the Power of Attorney by our client over the subdivided land titles of Phase 1 (which subdivision is still pending).

2. Take note that if your client fails to remedy the aforesaid defaults within the stipulated time, then the said Agreements shall be deemed terminated and in such an event our client shall be entitled to the remedies made available to them under the said Agreements.

Yours faithfully

For IZA NG YEOH & KIT

Sign.

HO CHEE KIT (Ms)

c.c. i) Client.

[35] It cannot be disputed that as at 24 September 2001, the plaintiff had failed to pay the interest charge of RM62,500 due on 31 May 2001. The third tranch of RM6m and the interest charge of RM62,500 had been outstanding for some four months. As at 21 December 2001, the date of the notice, the said payment remained outstanding. And when the defendant had by notice dated 16 January 2002 terminated the DRA those amounts had been outstanding for more than six months.

[36] The plaintiff took the position by letter dated 13 December 2001 that it was not in default of the DRA for the reason that the DRA had been suspended. The plaintiff further contended that, in any event, the breached were not breaches of the fundamental terms of the DRA. The plaintiff's letter was in the following terms:

Date: 13th December 2001

Iza Ng Yeoh & Kit

Advocates & Solicitors

Suite 13.08, 13th Floor

No. 138, Jalan Ampang

50450 Kuala Lumpur

Dear Sirs

DEVELOPMENT RIGHT AGREEMENT DATED 16TH MARCH 1997 AND SUPPLEMENTARY AGREEMENT ('DRA')

We refer to the above matter, our letter dated 4-10-2001 and your letter dated 12-12-2001 which we received on 21-12-2001 when our Mr. Chen was away in Beijing.

We write to reiterate that our clients maintain that there is no default of the DRA on the part of our clients by reason of a suspension of its performance and, accordingly, your clients are not entitle to a termination thereof.

Meanwhile, our clients reserve all their rights in the matter.

Yours faithfully,

sign.

cc. BCM Development Sdn Bhd.

[37] As I have already held earlier, the plaintiff's suspension of the DRA was unlawful.

[38] From this point, I will deal with the argument advanced by learned counsel for the plaintiff that the breaches to have been committed by the plaintiff in the notice of 12 December 2001 were not fundamental breaches of the DRA.

[39] In my view, it is an established principle of law that failure to do an act required under contract to be done by a specified breach, constitutes a fundamental breach, if time is stipulated to be the essence of the contract. In this regard, learned counsel for the defendants has brought to my attention the case of *Lombard North Central Plc v Butterworth* [1987] 1 QB 527 where the issue was whether a provision of a contract, which stipulated that time for payment by installments was to be of the essence, had the effect of making the defendant's late payment of the outstanding installments a repudiatory breach. In addressing this issue, Mustill LJ said at p 535:

> The reason why I am impelled to hold that the plaintiffs' contentions are well-founded can most conveniently be set out in a series of propositions.
>
> (a) Where a breach goes to the root of the contract, the injured party may elect to put an end to the contract. Thereupon both sides are relieved from those obligations which remain unperformed.
>
> (b) If he does so elect, the injured party is entitled to compensation for (a) any breaches which occurred before the contract was terminated, and (b) the loss of his opportunity to receive performance of the promisor's outstanding obligations.

(c) Certain categories of obligation, often called conditions, have the property that any breach of them is treated as going to the root of the contract. Upon the occurrence of any breach of condition, the injured party can elect to terminate and claim damages, whatever the gravity of the breach.

(d) It is possible by express provision in the contract to make a term a condition, even if it would not be so in the absence of such a provision.

(e) A stipulation that time is of the essence, in relation to a particular contractual term, denotes that timely performance is a condition of the contract. The consequence is that delay in performance is treated as going to the root of the contract, without regard to the magnitude of the breach.

(f) It follows that where a promisor fails to give timely performance of an obligation in respect of which timely stated to be of the essence, the injured party may elect to terminate and recover damages in respect of the promisor's outstanding obligations, without regard to the magnitude of the breach.

[40] Furthermore, s 56 of the Contracts Act 1950 states:

> When a party to a contract promises to do a certain thing at or before a specified time, or certain things at or before specified times, and fails to do any such thing at or before the specified time, the contract, or so much of it as has not been performed, becomes voidable at the option of the promise, if the intention of the parties was that time should be of the essence of the contract.

[41] In the case at hand, it cannot be disputed that the time of the essence stipulation provided by cl 23 of the DRA was to apply also to the payment of the tranches of the balance of the RM20m cash consideration and of the interest charges on the dates specified in cl 4.2.1, read with Appendix A, of the supplementary agreement. That is why, going by the principle of law, which I have stated earlier, I agree with the submission of learned counsel for the defendant that in the present case, the time of the essence stipulation was to apply also to the payment of the balance of the RM20m cash consideration and of the interest charges on the dates specified.

[42] As a result, it is my judgment that the plaintiff's failure to pay the amounts outstanding on the dates they became due constituted breaches of a fundamental term, going to the root of the contract, which entitled the defendant to terminate the DRA.

[43] Therefore, to sum it up, based on all the aforesaid reasons, the whole of the plaintiff's claim is dismissed with costs. On the other hand, I would allow the defendant's counterclaim and I accordingly make the following order:

(a) I grant an order in terms of prayer (a) of the defendant's counterclaim, that is to say, a declaration that the defendant had rightfully and validly terminated the DRA by reason of the plaintiff's breaches and that the defendant is not indebted to the plaintiff any money or liability;

(b) I grant an order in terms of prayers (b) and (c) of the defendant's counterclaim;

(c) prayers (d) and (m) to be assessed by the deputy registrar/senior assistant registrar; and

(d) I also order the plaintiff to pay the defendant costs to be taxed.

Plaintiff's claim dismissed with costs. Defendant's counterclaim allowed with costs.

Reported by Kohila Nesan